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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ESTATE OF FELIPE VARGAS,

9 Plaintiff,

10 v.

11 ST. PAUL FIRE & MARINE
INSURANCE COMPANY,

12 Defendant.

C15-555 TSZ

ORDER

13 THIS MATTER comes before the Court on Defendant's Motion for Summary
14 Judgment, docket. no. 36, and Plaintiff's Cross Motion for Summary Judgment, docket
15 no. 46. The Court enters the following order.

16 **Background**

17 Thomas Earl ("Earl"), an attorney who previously provided public defense
18 services in Grant County as an independent contractor, was sued in 2006 by a former
19 client, Felipe Vargas ("Vargas"), for alleged ineffective assistance of counsel. Ex. 17 to
20 Lether Decl. (docket 37-17). In response to the suit, Earl voluntarily petitioned for
21 bankruptcy protection in the Eastern District of Washington on June 13, 2006, under
22 Cause No. 06-01339-FLK13. Ex. 18 to Lether Decl. (docket no. 37-18). In January
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1 2009, Vargas obtained a judgment against Earl. Ex. 14 to Ahrend Decl. (docket no. 16-
2 16). Before the judgment was entered, Vargas settled with Grant County and released the
3 county and its insurers, with the caveat that the “Release does not include defendant
4 Thomas J. Earl.” Resp. to Summ. J. Mot. at 5 (docket no. 47). Approximately six years
5 later, after Vargas passed away, Earl entered into a stipulated settlement with the Estate
6 of Vargas (the “Estate”). Ex. 15 to Ahrend Decl. (docket no. 16-17). Pursuant to the
7 settlement, Earl assigned to the Estate any rights he may have had regarding an insurance
8 policy that St. Paul Fire & Marine Insurance Company (“St. Paul”) had issued to the
9 Washington Rural Counties Insurance Program (“WRCIP”) and its member counties,
10 including Grant County.

11 The current action is an insurance coverage dispute involving the insurance policy
12 that provides WRCIP with public entity management liability protection for the period of
13 September 1, 2004 to September 1, 2005, policy number GP06301649 (the “Policy”).
14 Mot. for Summ. J. at 3 (docket no. 36). Subject to various terms, conditions, and
15 exclusions, the policy covers “amounts any protected person is legally required to pay as
16 damages for covered loss.” Policy at 80, Ex. A to Karamessinis Decl. (docket no. 38-1).
17 The policy defines “protected person” to include WRCIP and its member counties, along
18 with their “elected or appointed officials,” “board members,” “employees,” and
19 “volunteer workers.” *Id.* at 83-84. The policy defines “employee” to exclude
20 “independent contractors.” *Id.* While the policy does not define “elected or appointed
21 official,” under the definition of “volunteer worker” it differentiates between
22 “independent contractors” and “appointed officials” as follows:
23

1 *Volunteer worker* means any person who performs duties related to the conduct of
2 your operations, other than:

- 3 • an employee;
- any of your elected or appointed officials or members of your boards; or
- any independent contractor.

4 *Id.* at 84.

5 The Estate contends that Earl was an “appointed official” of Grant County, while
6 he worked there as a contracted public defender, and therefore should be covered by the
7 WRCIP insurance policy for the conduct of his duties under the contract. Resp. to
8 Summ. J. Mot. at 9 (docket no. 47). St. Paul argues that Earl was not an appointed
9 official, and as an independent contractor for Grant County his conduct was not covered
10 by the policy. Summ. J. Mot. at 2, 4-5, 13-16 (docket no. 36).

11 **Discussion**

12 **A. Standard of Review**

13 “The court shall grant summary judgment if the movant shows that there is no
14 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
15 of law.” Fed. R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of
16 law when the non-moving party fails to make a sufficient showing on an essential
17 element of a claim in the case on which the nonmoving party has the burden of proof.
18 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for
19 trial where the record, taken as a whole, could not lead a rational trier of fact to find for
20 the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.
21 574, 586 (1986) (non-moving party must present specific, significant probative evidence,
22 not simply “some metaphysical doubt.”); Fed. R. Civ. P. 56(e).

B. Status as Insured

Resolution of defendant's motion for summary judgment turns on whether the St. Paul insurance policy covered Earl. Plaintiff argues that Earl was covered by the policy because, although he was not an employee, he should be considered an "appointed official." Resp. to Summ. J. Mot. at 10 (docket no. 47). *Jones v. St. Paul Fire & Marine Ins. Co.*, Western District of Washington Cause No. 2:15-cv-00531-MJP (a similar though unrelated case) is directly on point. In that case, the court found that a contract attorney hired by Grant County to provide public defense services for indigent juvenile defendants was not an appointed official, and was therefore not covered under the St. Paul policy. *Jones v. St. Paul Fire & Marine Ins. Co.*, No. 15-531 MJP, 2015 WL 4508884, at *2 (W.D. Wash. July 24, 2015).

As in *Jones*, the insurance policy at issue excludes independent contractors from coverage and differentiates between independent contractors and appointed officials. Also, as in *Jones*, Earl's contract with Grant County required him to maintain private malpractice insurance, to name the county as a co-insured, and to indemnify, defend, and hold harmless Grant County and its "appointed officers" against negligence liability and other costs. Contract at 16, Ex. 4 to Ahrend Decl. (docket no. 16-4). Moreover, Earl's contract with the county also specifies that "[n]o officer, employee, or agent of the COUNTY shall have any personal and/or financial interest, direct or indirect, in this Contract." *Id.* at 8.

1 The Court agrees with the holding in *Jones* and finds that the St. Paul insurance
2 policy does not cover Earl. Each of Plaintiff's claims depend on coverage under the
3 Policy.

4 C. Plaintiff's Claims

5 1. Breach of Contract

6 A plaintiff in a contract action must prove a valid contract between the parties,
7 breach, and resulting damage. *Lehrer v. State, Dept. of Social and Health Services*, 101
8 Wn.App. 509, 516, 5 P.3d 722 (2000)(citing *Nw. Indep. Forest Mfrs. v. Dep't of Labor &*
9 *Indus.*, 78 Wn.App. 707, 712, 899 P.2d 6 (1995)). "Under Washington law, for a third
10 party to sue for breach of contract, 'both contracting parties must intend that a third party
11 beneficiary contract be created.'" *Jones v. St. Paul Fire & Marine Ins. Co.*, 2015 WL
12 4508884, at *3 (W.D. Wash. July 24, 2015)(citing *Rajagopalan v. NoteWorld, LLC*, 718
13 F.3d 844, 847 (9th Cir. 2013)).

14 Plaintiff argues that Earl was entitled to coverage under the Policy because he was
15 an "appointed official" of Grant County. Mot. to Remand at 10 (docket no. 15). Yet, as
16 in *Jones*, "there is good reason to conclude that Grant County ... specifically did not
17 insure" Earl, as his contract with Grant County also "required him to maintain private
18 malpractice insurance, to name the county as a well as co-insured, and to indemnify,
19 defend, and hold harmless Grant County (as well as Grant County's 'appointed officers')
20 against negligence liability and other costs." *Jones v. St. Paul Fire & Marine Ins. Co.*,
21 2015 WL 4508884, at *2 (W.D. Wash. July 24, 2015). Along with Earl's classification
22 as a non-employee contractor, these requirements further demonstrate that Grant County
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1 did not intend to create a third party beneficiary relationship with Earl in connection with
2 the county's insurance policy. Therefore, the Court finds that Earl was not a third-party
3 beneficiary.

4 **2. Insurance Bad Faith**

5 To prevail on a bad faith claim, a policyholder must show that their insurer's
6 breach of the insurance contract was "unreasonable, frivolous, or unfounded." *American*
7 *States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469-70, 78 P.3d 1266 (2003).
8 An "insurer is entitled to summary judgment if reasonable minds could not differ that its
9 denial of coverage was based upon reasonable grounds." *Smith v. Safeco Ins. Co.*, 150
10 Wn.2d 478, 486, 78 P.3d 1274 (2003). Earl did not tender a claim and no one tendered a
11 claim on his behalf prior to commencing the current action. Karamessinis Decl. at ¶ 4
12 (docket no. 38). Even if a claim had been tendered earlier, a denial would have been
13 reasonable and appropriate because Earl was not insured under the Policy.

14 **3. Consumer Protection Act**

15 To establish a Consumer Protection Act ("CPA") claim, a plaintiff must show: (1)
16 an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that
17 impacts the public interest; (4) injury to his business or property; and (5) that the injury
18 was proximately caused by the unfair or deceptive act. *Hangman Ridge Training Stables,*
19 *Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784-785, 719 P.2d 531 (1986). The
20 insurance commissioner has defined several unfair methods of competition or unfair or
21 deceptive acts or practices in the business of insurance, which are codified in WAC 284–
22 30–330. "Committing any one of these acts or practices constitutes a per se unfair trade
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1 practice.” *Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 260, 928
2 P.2d 1127, 1136 (1996), as amended (Feb. 7, 1997). “[A] reasonable basis for denial of
3 an insured’s claim constitutes a complete defense to any claim that the insurer acted in
4 bad faith or in violation of the Consumer Protection Act.” *Id.*

5 Earl was not insured under the Policy and was not entitled to coverage. He did not
6 tender a claim prior to the filing of the current action, and the Estate has not alleged any
7 technical violations of any WAC provision. As a result, the Estate’s CPA claim is
8 without merit.

9 **4. Negligence**

10 To survive summary judgment on a negligence claim, an insured must show: “(1)
11 the existence of a duty to the person alleging negligence; (2) breach of that duty; (3)
12 resulting injury; and (4) proximate cause between the breach and the injury.” *American*
13 *Commerce Ins. Co. v. Ensley*, 153 Wn. App. 31, 42, 220 P.3d 215 (2009), *review denied*,
14 169 Wn.2d 1010 (2010). While an insurer has a duty of good faith to its policyholder,
15 “[w]hen no duty of care exists, a defendant cannot be subject to liability for negligent
16 conduct.” *Webstad v. Stortini*, 83 Wn. App. 857, 865, 924 P.2d 940 (1996).

17 St. Paul did not owe any duty of care to Earl because Earl was not insured and was
18 not entitled to coverage under the Policy. There is no basis for the Estate’s negligence
19 claim.

20 **5. Breach of Fiduciary Duty**

21 To establish a claim for breach of fiduciary duty, the plaintiff must prove: (1) the
22 existence of a duty owed by fiduciary to the plaintiff, (2) breach of that duty, (3) resulting
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injury, and (4) the claimed breach proximately caused the injury. *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994). “A fiduciary relationship arises in Washington when ‘one party occupies such a relation to the other party as to *justify* the latter in expecting that his interests will be cared for.’” *Jones v. St. Paul Fire & Marine Ins. Co.*, 2015 WL 4508884, at *3 (W.D. Wash. July 24, 2015)(citing *Liebergessell v. Evans*, 93 Wn.2d 881, 889-90 (1980)(citation omitted)).

Earl’s contract with Grant County required him to maintain his own insurance and to indemnify the county. Contract at 16, Ex. 4 to Ahrend Decl. (docket no. 16-4). Because the contract gave Earl duties toward Grant County and not the other way around, Earl could not justifiably expect the county’s insurance carrier was caring for his interests.

D. Plaintiff’s Cross-Motion

Plaintiff moves for partial summary judgment that:

The underlying judgment in *Vargas v. Earl*, U.S. District Court, Eastern District of Washington, No. CV-06-146-JLQ, was against Thomas Earl in his official capacity, and may be satisfied from the assets of Grant County, by garnishing the proceeds of the insurance policy issued by St. Paul Fire & Marine Insurance Co.

Cross-Mot. for Partial Summ. J. at 1 (docket no. 46). Plaintiff argues that the Estate is entitled to garnish St. Paul to collect on the judgment against Earl because its policy covers Grant County and the judgment against Earl was based on his official capacity as administrator of public defense in the county. Resp. to Summ. J. Mot. at 1-2 (docket no. 47). Plaintiff contends that Vargas was not prevented from pursuing a direct claim against Grant County by means of an official-capacity suit against Earl because the

1 language “It is understood that this Release does not include defendant Thomas J. Earl” is
2 included in the settlement agreement between Vargas and the county. Resp. to Summ. J.
3 Mot. at 5-6 (docket no. 47); Release and Hold Harmless Agr. at 1, Ex. 13 to Ahrend Decl.
4 (docket no. 16-15).¹ Plaintiff argues that, as such a suit was not barred by the settlement
5 agreement, the cause of action in Vargas’s suit against Earl was an “official capacity”
6 suit. Defendant contends that Vargas’s suit against Earl was only brought against him in
7 his personal capacity. Def.’s Reply at 4 (docket no. 49).

8 Personal-capacity suits “seek to impose personal liability upon a government
9 official for actions he takes under color of state law.” *Kentucky v. Graham*, 473 U.S.
10 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985)(citations omitted). Official-
11 capacity suits, in contrast, “generally represent only another way of pleading an action
12 against an entity of which an officer is an agent.” *Id.* In a §1983 action, it is enough to
13 show that an “official, acting under color of state law,” caused the deprivation of a
14 federal right to establish personal responsibility. *Id.* at 166. However, a public entity’s
15 “policy or custom” must have played a part in the violation of federal law for a plaintiff
16 to prevail in an official-capacity suit. *Id.* A victory in a personal-capacity suit is only a
17 victory against the individual defendant, not against the entity that employs him. *Id.* at
18 167.

21 ¹ Plaintiff distinguishes the settlement agreement between Vargas and Grant County from the settlement
22 agreement between Jones and Grant County which arose from the action in *Jones* because that agreement
23 included the language “personal capacity and not in his official capacity, the intent being to release all
claims against GRANT COUNTY.” Ex 41 to Ahrend Decl. at 1 (docket no. 48-12).

1 Plaintiff relies upon *Kentucky* as authority to substantiate its assertion that the
2 judgment in Vargas's case against Earl "may be satisfied from the assets of the county,
3 including its insurance policies." Resp. to Summ. J. Mot. at 5 (docket no. 47). Yet,
4 while plaintiff offers indicia of proof that Vargas's suit against Earl was a personal-
5 capacity action, it does little to demonstrate that the complaint, jury instructions, or
6 verdict point to Earl's official-capacity liability. The Judgment against Earl does not
7 state that it was entered for acts done in Earl's alleged "official capacity." Ex. 14 to
8 Ahrend Decl. at 1 (docket no. 48-7). Also, while the language of Vargas's settlement
9 agreement with Grant County did not specifically state that it precluded any suit against
10 Earl in his "official capacity," the agreement did "fully [discharge] Grant County" from
11 "any and all manner of claims, demands, liabilities, obligations, damages, causes of
12 action or suits, whether known or unknown, which Vargas may have against Grant
13 County." Release and Hold Harmless Agr. at 1, Ex. 13 to Ahrend Decl. (docket no. 16-
14 15). This agreement thereby released any and all potential "official capacity" liability
15 given that official-capacity suits are simply "another way of pleading an action against [a
16 government] entity." *Kentucky*, 473 U.S. at 165.

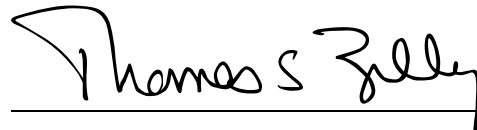
17 Washington law provides that a liability insurer is only "subject to garnishment
18 upon the entry of judgment against its insured debtor." *Weyerhaeuser Co. v. Calloway*
19 *Ross, Inc.*, 133 Wn. Ap.. 621, 624, 137 P.3d 879 (2006). Vargas did not receive a
20 judgment against Grant County, and before the judgment against Earl was entered,
21 Vargas settled with the county, releasing it and its insurers from any liability, and
22 therefore the Estate has no right to garnish St. Paul or the Policy.
23

1 **Conclusion**

2 Plaintiff's request for a Rule 56(d) continuance is DENIED. Additional discovery
3 is unnecessary and discovery will not change the fact that there is no coverage. For the
4 foregoing reasons, defendant's motion for summary judgment, docket no. 36, is
5 GRANTED and plaintiff's cross motion for summary judgment, docket no. 46, is
6 DENIED. Plaintiff's complaint is DISMISSED with prejudice. In light of the Court's
7 ruling, defendant's counterclaim for declaratory judgment is DISMISSED as moot. The
8 Clerk is DIRECTED to enter judgment consistent with this Order, to send a copy of this
9 Order to all counsel of record, and to CLOSE this case.

10 IT IS SO ORDERED.

11 Dated this 3rd day of February, 2016.

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14 Thomas S. Zilly
15 United States District Judge
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